

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

In the Matter of)

The Telephone Consumer)
Protection Act of 1991)

CC Docket No. 92-90

To: The Commission

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COMMENTS IN SUPPORT OF PETITIONS FOR RECONSIDERATION
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

The American Institute for Cancer Research, the California Consortium for the Prevention of Child Abuse, Federation on Child Abuse & Neglect, "Just Say No", International, Mothers Against Drunk Driving, and the Vietnam Veterans Memorial Fund, Inc., (collectively, "Nonprofit Group"), by their attorneys and pursuant to Commission Rule 1.429(f), submit the following comments in support of the Petition for Reconsideration ("Petition") filed herein on November 23, 1992 by Reese Brothers, Inc.^{1/} The organizations in the Nonprofit Group are further identified in Appendix A hereto.

^{1/} By Public Notice of December 15, 1992, the Commission announced the filing of Reese Brothers' Petition. This Public Notice was printed in the Federal Register on December 18, 1992, 57 Fed. Reg. 60202.

The Direct Marketing Association ("DMA") also filed a Petition for Clarification and Reconsideration herein. The petition requested that the Commission modify several aspects of Rule 64.1200, including a change in Rule 64.1200(f)(3)(iii) to make clear that calls on behalf of nonprofit organizations are exempt from Rule 64.1200(e) (see pp. 8-11). The Nonprofit Group also supports the somewhat different but equally sound legal and public policy arguments advanced by DMA in support of exempting independent telemarketers which make calls on-behalf of nonprofits from Rule 64.1200(e). The Nonprofit Group expresses no views as to the other matters raised in DMA's petition.

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I. Summary

1. The Nonprofit Group filed timely reply comments ("Reply Comments") in this proceeding in which it urged that both nonprofits and independent telemarketers making calls on behalf of nonprofit organizations be exempted from what are now Commission Rules 64.1200(a)(2) and (e).

2. The Commission revised the original language of what is now Rule 64.1200(c) to make clear that calls made both by and on behalf of nonprofits are exempt from Rule 64.1200(a)(2), the rule which largely bans the use of pre-recorded and artificial voice messages in commercial calls to residential telephones. On the other hand, the language of Rule 64.1200(f)(3)(iii), which appeared for the first time in the Commission's Report and Order^{2/} herein; arguably does not exclude calls made by independent telemarketers on behalf of nonprofits from the category of "telephone solicitations" which are prohibited unless the telemarketer maintains a "do not call" list. The Nonprofit Group's specific concern is that Rule 64.1200(f)(3)(iii) excludes only calls made by a nonprofit from the definition of "telephone solicitations".

3. The Nonprofit Group supports the requests of Reese Brothers and the DMA that Rule 64.1200(f)(3)(iii) be revised to clarify that telemarketers making calls on behalf of nonprofits are excluded from the requirements of Rule 64.1200(e).

^{2/} 57 Fed. Reg. 48333, October 23, 1992.

II. Congress and the Commission Intended
to Exempt Telemarketers Making Calls On
Behalf Of Nonprofits from Rule 64.1200(e)

4. Careful reading of the Telephone Consumer Protection Act of 1991 ("TCPA") and its legislative history as well as the Commission's Notice of Proposed Rulemaking ("Notice")^{3/} and Report and Order herein makes clear that both Congress and the Commission intended to exclude calls made both by and on behalf of nonprofits from their respective definition of "telephone solicitations". However, that intent is not clearly reflected in Rule 64.1200(f)(3)(iii), or the parallel statutory provision, standing alone. (The language of Rule 64.1200(f)(3)(iii) is drawn directly from the TCPA.)

5. An argument can be made that the differing language of the exemptions in Rules 64.1200(c) and (f)(3)(iii) is a deliberate regulatory distinction by the Commission. The Nonprofit Group submits that there is no sound legal or public policy basis for such a distinction. Quite the contrary, there are compelling legal and public policy bases for treating both categories of calls the same. Consequently, the Nonprofit Group does not believe either Congress or the Commission intended such a result and it supports the requests of Reese Brothers and the DMA that Rule 64.1200(f)(3)(iii) be revised to eliminate any possible ambiguity.

^{3/} 7 FCC Rcd. 2735 (1992).

III. Public Policy and Legal Issues

6. In its Reply Comments, the Nonprofit Group extensively described the operational and economic factors which make the availability of independent telemarketing firms critically important to both large and small nonprofit organizations. We will not burden this filing with a further recitation of those factors. Rather, we call the Commission's attention to that discussion at pages 4-8 of our Reply Comments herein.

7. That discussion in our Reply Comments provided yet additional evidence that Congress and the Commission were correct in concluding that substantial public interest benefits would flow from exempting calls made both by and on behalf of nonprofits from the requirements of Rules 64.1200(a)(2) and (e). Importantly, treating calls made by nonprofits differently than calls made on behalf of nonprofits would do absolutely nothing to further the underlying public policy objectives of the TCPA. The only result of such disparate treatment would be to increase the telemarketing costs of nonprofits. It would force them to either: (i) pay larger fees to independent telemarketers to cover the added cost of regulatory compliance; or (ii) shift to generally more expensive in-house telemarketing staffs. Such a result is especially unwarranted in this case because neither the Commission nor any party to this proceeding has ever suggested any public policy or other argument for requiring independent

telemarketers to maintain "do not call" lists for their nonprofit customers while exempting the nonprofits themselves from the requirement.

8. Moreover, as DMA emphasized in its petition for reconsideration, treating independent telemarketers working for nonprofits differently than the nonprofits themselves would not only be anomalous but also contrary to long-established principals of agency law.

IV. The First Amendment Issue

9. In its Reply Comments herein, the Nonprofit Group argued that the exemption of calls made both by and on behalf of nonprofit organizations is required under Riley v. National Federation of the Blind of North Carolina, Inc. 487 U.S. 781 (1988) and related cases. In those cases, the U.S. Supreme Court has held that the speech of tax exempt organizations -- including their fundraising activities -- is entitled to full First Amendment protection. In contrast, purely commercial speech is entitled to a lesser but nonetheless substantial measure of First Amendment protection.

10. Since the filing of our Reply Comments, Judge James A. Redden of the U.S. District Court for the District of Oregon has enjoined enforcement of those provisions of the TCPA which prohibit the use of artificial or pre-recorded voices Kathryn Moser and National Association of Telecomputer Operators v. Federal Communications Commission, Case No. 92-1408-AS, slip opinion released December 22, 1992. In a

Carefully reasoned analysis of those provisions of the TCPA, Judge Redden concluded, at least preliminarily, that the statutory provision runs afoul of the First Amendment's protection of commercial speech because it restricts speech far more broadly than necessary to accomplish the policy objectives which Congress sought to achieve in adopting the TCPA. Judge Redden emphasized that any restraint on even commercial speech is prohibited unless it: (i) achieves a compelling public policy objective, and (ii) does so with the minimum possible burden on the speech in question.

11. The record developed by Congress and the Commission makes clear that there are compelling public policy reasons to exempt nonprofits and their independent telemarketing firms from the limitations of Rules 64.1200(a)(2) and (e). No evidence has been developed to support disparate treatment of nonprofits and their independent telemarketing firms under 64.1200(e). Thus, the record provides no constitutionally valid basis for requiring independent telemarketers working for nonprofits to maintain a "do not call" list for each nonprofit while the nonprofits themselves are exempted from the "do not call" list requirement. This conclusion is especially compelling since the case law makes clear that the speech of nonprofits is entitled to even greater protection than the purely commercial speech at issue in the Moser case.

IV. Conclusion

12. For the reasons set forth above, and the additional reasons noted in its Reply Comments herein, the Nonprofit Group urges that the Commission reconsider and modify Rule 64.1200(f)(3)(iii) as requested by Reese Brothers and DMA in their referenced petitions for reconsideration herein.

Respectfully submitted,

AMERICAN INSTITUTE FOR CANCER RESEARCH,
THE CALIFORNIA CONSORTIUM FOR THE
PREVENTION OF CHILD ABUSE,
FEDERATION ON CHILD ABUSE & NEGLECT,
"JUST SAY NO", INTERNATIONAL,
MOTHERS AGAINST DRUNK DRIVING, and
VIETNAM VETERANS MEMORIAL FUND, INC.

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January 4, 1993

Appendix A

Following are very brief descriptions of each of the six tax-exempt organizations participating in these comments.

American Institute for Cancer Research

The American Institute for Cancer Research is a tax-exempt organization established under District of Columbia law which maintains its headquarters in Washington. Its objective is to provide financial support for research into the relationship between diet, nutrition and cancer and to expand consumer knowledge about the importance of diet and nutrition in the prevention and treatment of cancer.

California Consortium for the Prevention of Child Abuse

This California corporation is a tax-exempt organization with its principal office in Sacramento. It is a statewide chapter of the National Committee for the Prevention of Child Abuse. The California organization has been in existence for 15 years. It is a coalition of some 15,000 individuals and local organizations across the state. It provides state-wide coordination, support and leadership to individuals and local organizations working to prevent and treat child abuse and neglect in California.

Federation on Child Abuse & Neglect

This organization is based in Albany, New York. It is the New York affiliate of the National Committee for the Prevention of Child Abuse, Inc. The Federation includes 45 local community coalitions and 65 affiliated organizations throughout the State of New York. The Federation's mission is to promote efforts to develop effective public policies and services to prevent child abuse and neglect.

Its long-term goals include the development of programs to: identify and implement effective strategies for the prevention of child abuse and neglect; increase public awareness of the child abuse problem; and establish an informed and effective statewide network of child abuse prevention organizations.

"Just Say No" International

"Just Say No" is an Oakland, California-based corporation committed to helping prevent drug use by children and teenagers. To achieve this purpose, "Just Say No" has some 11,000 adult and 8,000 teenage leaders who provide direction and support for some 13,000 "Just Say No" clubs across the Country. This is the largest youth anti-drug movement ever to emerge in this country. Through its work with these grassroots organizations, "Just Say No":

- (i) fosters and reinforces an attitude of intolerance toward drugs and drug use;
- (ii) promotes healthy lifestyles and constructive alternatives to the use of dangerous drugs; and
- (iii) provides children and teenagers with the information, skills and support they need to resist peer pressure and other influences to use drugs.

Mothers Against Drunk Driving

Mothers Against Drunk Driving ("MADD") is a District of Columbia non-profit corporation which maintains its headquarters in Irving, Texas. MADD is committed to stopping drunk driving and supporting the victims of auto crashes involving drunk drivers. This national organization has over 2.8 million supporters who are actively involved in the work of its more than 400 local chapters.

Vietnam Veterans Memorial Fund, Inc.

This District of Columbia non-profit corporation maintains its headquarters in Washington. Its 650,000 supporters nationwide provided in excess of \$8,000,000 for the construction of the Vietnam Veterans Memorial on the Mall in Washington. The organization now provides funding for: ceremonies at the Memorial; the addition of names; renovation and maintenance; and such other support as may be needed.